



November 12, 2001

Mr. Kuruvilla Oommen
Assistant City Attorney
City of Houston - Legal Department
P.O. Box 1562
Houston, Texas 77251-1562

OR2001-5244

Dear Mr. Oommen:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 154706.

The City of Houston (the "city") received a written request for "all documents prepared, generated, or assembled in connection with the disciplinary actions against Houston Police Officer Amando Huerta, Jr." You have submitted to our office as responsive to the request records from three internal affairs investigations, labeled Exhibits 2, 3, and 4, and records you characterize as the officer's "personnel file," labeled Exhibit 5. You contend that the requested information is excepted from disclosure pursuant to section 552.103 of the Government Code.¹

We note at the outset that Exhibits 2, 3, 4, and portions of Exhibit 5 consist of completed Internal Affairs investigations. Section 552.022 of the Government Code provides, in relevant part:

(a) Without limiting the amount or kind of information that is public information under this chapter, the following categories of information are public information and not excepted from required disclosure under this chapter *unless they are expressly confidential under other law*:

(1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108[.]

¹Although you also raised other exceptions to disclosure in your initial letter to this office, you have not explained the applicability of those exceptions. See Gov't Code § 552.301(e)(1)(A). Consequently, we do not consider those exceptions here.

Gov't Code § 552.022(a)(1) (emphasis added). These investigations are expressly made public under section 552.022(a)(1) and may be withheld only if they are made confidential under other law. Although you argue that the investigations are excepted under section 552.103 of the Government Code, this provision is a discretionary exception and therefore is not "other law" for purposes of section 552.022.² Consequently, the city may not withhold any records from the IAD investigations pursuant to section 552.103 of the Government Code.

We note, however, that two of the IAD investigations are made confidential under section 143.089 of the Local Government Code. Section 143.089 of the Local Government Code provides for the maintenance of civil service files and what information may be kept in those files:

(a) The director or the director's designee shall maintain a personnel file on each fire fighter and police officer. The personnel file must contain any letter, memorandum, or document relating to:

....

(2) any misconduct by the fire fighter or police officer if the letter, memorandum, or document is from the employing department and if the misconduct resulted in disciplinary action by the employing department *in accordance with this chapter*

....

(b) A letter, memorandum or document relating to alleged misconduct by the fire fighter or police officer may not be placed in the person's personnel file if the employing department determines that there is insufficient evidence to substantiate the charge of misconduct.

(c) A letter, memorandum, or document relating to disciplinary action taken against the fire fighter or police officer or to alleged misconduct by the fire fighter or police officer that is placed in the person's personnel file as provided by subsection (a)(2) shall be removed from the employee's file if the commission finds that:

²Discretionary exceptions are intended to protect only the interests of the governmental body, as distinct from exceptions which are intended to protect information deemed confidential by law or the interests of third parties. See, e.g., Open Records Decision Nos. 665 at 2 n.5 (2000) (governmental body may waive litigation exception, section 552.103), 630 at 4 (1994) (governmental body may waive attorney-client privilege, section 552.107(1)), 592 at 8 (1991) (governmental body may waive section 552.104, information relating to competition or bidding), 549 at 6 (1990) (governmental body may waive informer's privilege), 522 at 4 (1989) (discretionary exceptions in general). Discretionary exceptions therefore do not constitute "other law" that makes information confidential.

- (1) the disciplinary action was taken without just cause; or
- (2) the charge of misconduct was not supported by sufficient evidence. [Emphasis added.]

Information that subsections 143.089(b) and (c) prohibit from being placed in the civil service file may be maintained in the police department's internal files, as provided in section 143.089(g). This subsection provides:

A fire or police department may maintain a personnel file on a fire fighter or police officer employed by the department for the department's use, *but the department may not release any information contained in the department file to any agency or person requesting information relating to a fire fighter or police officer.* The department shall refer to the director or the director's designee a person or agency that requests information that is maintained in the fire fighter's or police officer's personnel file. [Emphasis added.]

The city's police department may keep information in these separate, internal files for its own use. Section 143.089(g) makes records kept in the police department's internal files confidential. *City of San Antonio v. Texas Attorney General*, 851 S.W.2d 946. (Tex. App.--Austin 1993, writ denied).

Chapter 143 addresses the following types of disciplinary actions: removal, suspension, demotion, and uncompensated duty. See Local Gov't Code §§ 143.051-.055. Exhibits 2 and 4 pertain to internal affairs investigations that did not result in a disciplinary action contemplated under chapter 143. Accordingly, we conclude that Exhibits 2 and 4 must be withheld from the public pursuant to section 552.101 of the Government Code in conjunction with section 143.089(g) of the Local Government Code.

On the other hand, the records you submitted as Exhibit 3, as well as portions of Exhibit 5, pertain to internal affairs investigations that did result in disciplinary actions as contemplated under chapter 143 of the Local Government Code. Accordingly, all records pertaining to these two IAD investigations must be contained in the officer's civil service file, which is available to the public under the Public Information Act unless the information is excepted from disclosure under chapter 552 of the Government Code. See Open Records Decision No. 562 (1990). As explained above, the exception you raised, section 552.103, is not applicable to the completed IAD reports. Because you have not raised any other applicable exception to disclosure, we conclude that all documents pertaining to the IAD investigations represented by Exhibit 3 and the documents we have marked in Exhibit 5 must be released to the requestor.

We now address the applicability of section 552.103 of the Government Code to the remaining documents at issue in Exhibit 5. Section 552.103 of the Government Code is commonly referred to as the "litigation exception." Under section 552.103(a) and (c), the governmental body raising this exception must demonstrate that (1) litigation involving the

governmental body was pending or reasonably anticipated at the time of the records request, and (2) the information at issue is related to that litigation. *See also University of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.--Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990). A governmental body must meet both prongs of this test for information to be excepted under section 552.103.

In this instance, you have demonstrated that the information at issue relates to litigation against the city that was pending on the date of the request. We therefore conclude that the city may withhold the remaining information in Exhibit 5 at this time pursuant to section 552.103 of the Government Code.

In reaching this conclusion, however, we assume that the opposing parties to the litigation have not previously had access to the records at issue; absent special circumstances, once information has been obtained by all parties to the litigation, *e.g.*, through discovery or otherwise, no section 552.103 interest exists with respect to that information. Open Records Decision Nos. 349 (1982), 320 (1982). We also note that the applicability of section 552.103 ends once the litigation has been concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

In summary, the city must release to the requestor all documents pertaining to the two IAD investigations represented by Exhibit 3 and the documents we marked in Exhibit 5. Exhibits 2 and 4 are made confidential in their entirety under section 143.089(g) of the Local Government Code, and thus must be withheld from the public pursuant to section 552.101 of the Government Code. The city may withhold the remaining information contained in Exhibit 5 pursuant to section 552.103 of the Government Code.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the

governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building & Procurement Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Michael A. Pearle
Assistant Attorney General
Open Records Division

MAP/RWP/sdk

Ref: ID# 154706

Enc. Submitted documents

c: Mr. Greg S. Lindley
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(w/o enclosures)